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Nos. 84-495 and 84-1379

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1985

RICHARD THORNBURGH, ET AL., APPELLANTS
v.
AMERICAN COLLEGE OF OBSTETRICIANS AND
GYNECOLOGISTS, ET AL.

EUGENE F. DIAMOND, ET AL., APPELLANTS
v.
ALLAN G. CHARLES, ET AL.

ON APPEAL FROM
THE UNITED STATES COURTS OF APPEALS
FOR THE THIRD AND SEVENTH CIRCUITS

MOTION FOR LEAVE TO FILE BRIEF OF
AMICUS CURIAE -- WOMEN LAWYERS'
ASSOCIATION OF LOS ANGELES, CALIFORNIA;
CALIFORNIA WOMEN LAWYERS; THE WOMEN'S
BAR ASSOCIATION OF ILLINOIS; THE
FLORIDA ASSOCIATION OF WOMEN LAWYERS;
FLORIDA ASSOCIATION OF WOMEN LAWYERS,
DADE COUNTY CHAPTER; AND CALIFORNIA
LAWYERS FOR INDIVIDUAL FREEDOM IN
SUPPORT OF RESPONDENTS AND AMICUS BRIEF

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Women Lawyers' Association
of Los Angeles, California; California
Women Lawyers; the Women's Bar Associa-
tion of Illinois; the Florida Associa-
tion of Women Lawyers; The Florida
Association of Women Lawyers, Dade
County Chapter; and California Lawyers
for Individual Freedom respectfully
move this Court for leave to file the
accompanying brief in this case as
amicus curiae. The consent of the
attorneys for respondents and one of
the appellants herein has been ob-
tained, but the attorneys for the
remaining appellant herein refused to
consent to the filing of this brief.

Applicants have an interest
in this case because they are organ-
izations that have professional women



as members, that have women as clients, and that are concerned with protecting the constitutional rights of women in society. Applicants and their members are personally and professionally concerned with the importance of preserving a woman's right to decide whether to terminate a pregnancy because pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of unwanted children.

The attached brief responds to the arguments made by the Solicitor General of the United States in his amicus brief filed in support of respondents. Applicants believe

that the Solicitor General's arguments will not be adequately addressed by the respondents. If applicants' argument is approved by this Court, the decisions of the Appellate Courts below must be affirmed.

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CALIFORNIA; CALIFORNIA WOMEN LAWYERS;
THE WOMEN'S BAR ASSOCIATION OF
ILLINOIS; THE FLORIDA ASSOCIATION OF
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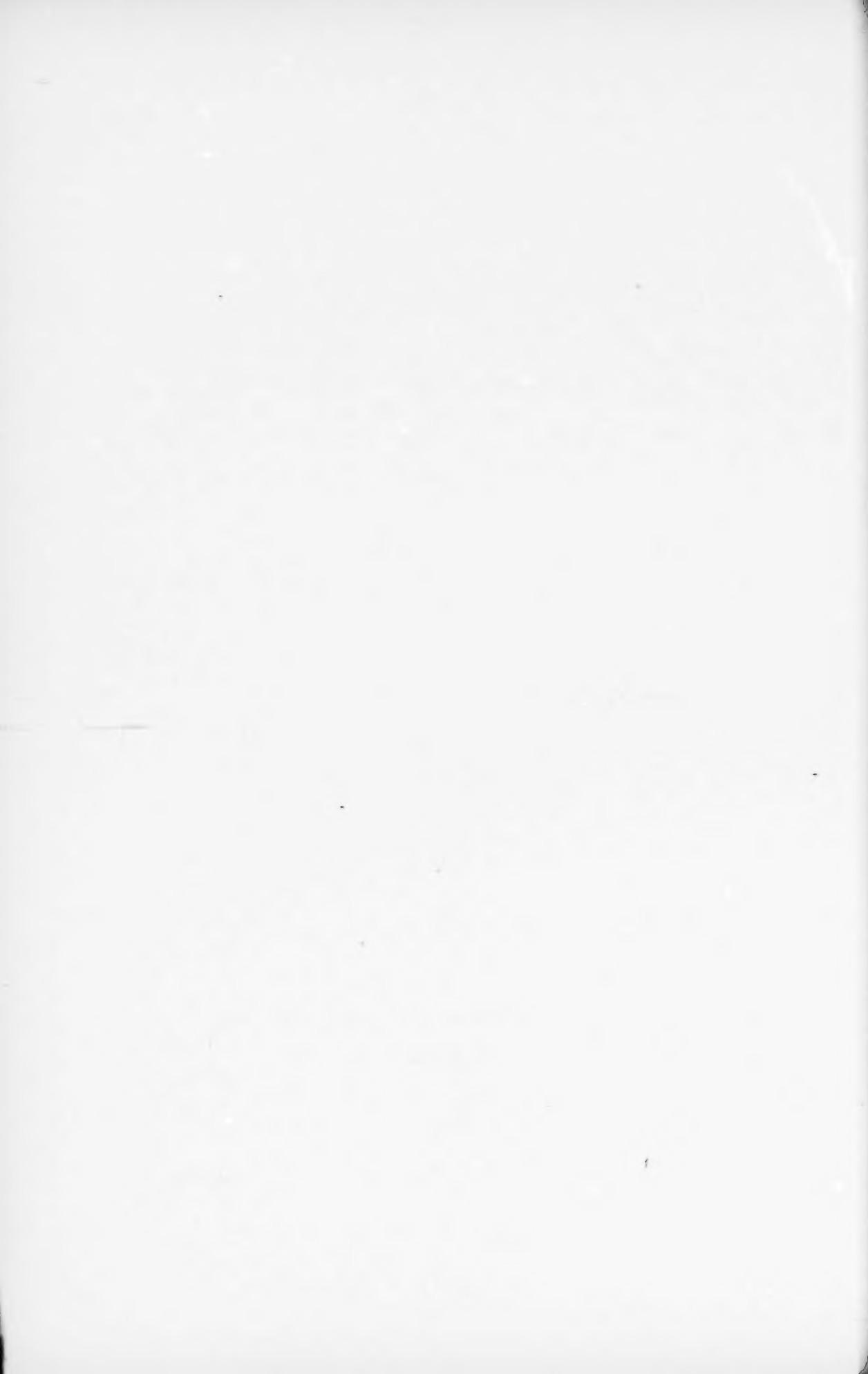
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- Pierce v. Society of
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Miscellaneous

- Mehren, A Refutation of
'Silent Scream,' Los Angeles
Times, Aug. 17, 1985
Part V, at 1, col. 4 33
- Shepard's United States
Citations (1984, January
1985 & July 1985) 12
- Tribe, The Supreme Court 1972
Term -- Foreword: Toward a
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INTEREST OF AMICI CURIAE

Amici curiae are state or local bar organizations having as members female and male lawyers and judges who are concerned with the special problems faced by women.

California Lawyers for Individual Freedom is an organization of attorneys in the San Francisco area concerned with the preservation of personal liberties under the Constitution.

Amici and their members are personally and professionally concerned with the importance of preserving a woman's right to decide



whether to terminate a pregnancy because, as this Court found in Roe v. Wade, 410 U.S. 113, 153 (1973), pregnancy may adversely affect a woman's health, her life plans, the welfare of her family, and the welfare of an unwanted child. Amici therefore submit this brief in response to the amicus curiae brief submitted by the Solicitor General of the United States.

SUMMARY OF ARGUMENT

The Solicitor General's argument that there is no fundamental constitutional right to choose whether to terminate a pregnancy is



untenable and unfounded. The doctrine of stare decisis requires reaffirmance of the holding in Roe v. Wade, which recognized that right. The right to choose to terminate a pregnancy is a fundamental right concerning a private decision about family matters that is clearly protected by the Due Process Clause of the Fourteenth Amendment. It is a well-established principle of constitutional law that any state regulation of such a fundamental right is subject to strict scrutiny and must be justified by a compelling state interest where the regulation impinges on the individual's right. In applying this test, the



state interest must be defined in a way that does not violate the Establishment Clause of the First Amendment. Finally, public policy and opinion support the Court's continued recognition of the constitutional right to reproductive choice.

ARGUMENT

I. INTRODUCTION.

In an amicus curiae brief in this action, the Solicitor General has urged this Court to overturn its decision in Roe v. Wade, 410 U.S. 113 (1973), holding that a woman has a fundamental right to decide whether to terminate a pregnancy, and, by



implication, the score of its decisions which have accepted and applied Roe v. Wade.

Only two years ago the Court reviewed and explicitly reaffirmed Roe v. Wade in City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983). In fact, in Akron the Court not only approved Roe v. Wade, but also clearly reaffirmed that a woman's right to choose whether to terminate a pregnancy is a fundamental constitutional right and, therefore, any state regulation of it is subject to strict scrutiny.

The Solicitor General would take away a woman's right to



choose whether to terminate her pregnancy and instead interject governmental control into our most personal and private decisions. Adoption of the Solicitor General's position would result in a return to the days of unsafe, illegal abortions for women unable to endure a harmful or unwanted pregnancy.

Amici curiae believe that every person has a constitutional right to be free from the intrusion of the government into his or her most intimate personal decisions, and that this right clearly encompasses a woman's right to choose what will happen to her own body and, indeed, her own life. In this

brief, amici curiae will demonstrate that the decisions in Roe v. Wade and Akron should be reaffirmed not only on the basis of stare decisis, but also on the ground that they were correctly decided in the first instance. Amici urge the Court to once again reaffirm what has become a long line of decisions recognizing and protecting a woman's right to reproductive choice.

II. STARE DECISIS REQUIRES THAT ROE V. WADE BE REAFFIRMED.

The Solicitor General urges the Court to ignore the doctrine of stare decisis as applied to a woman's well-recognized constitu-

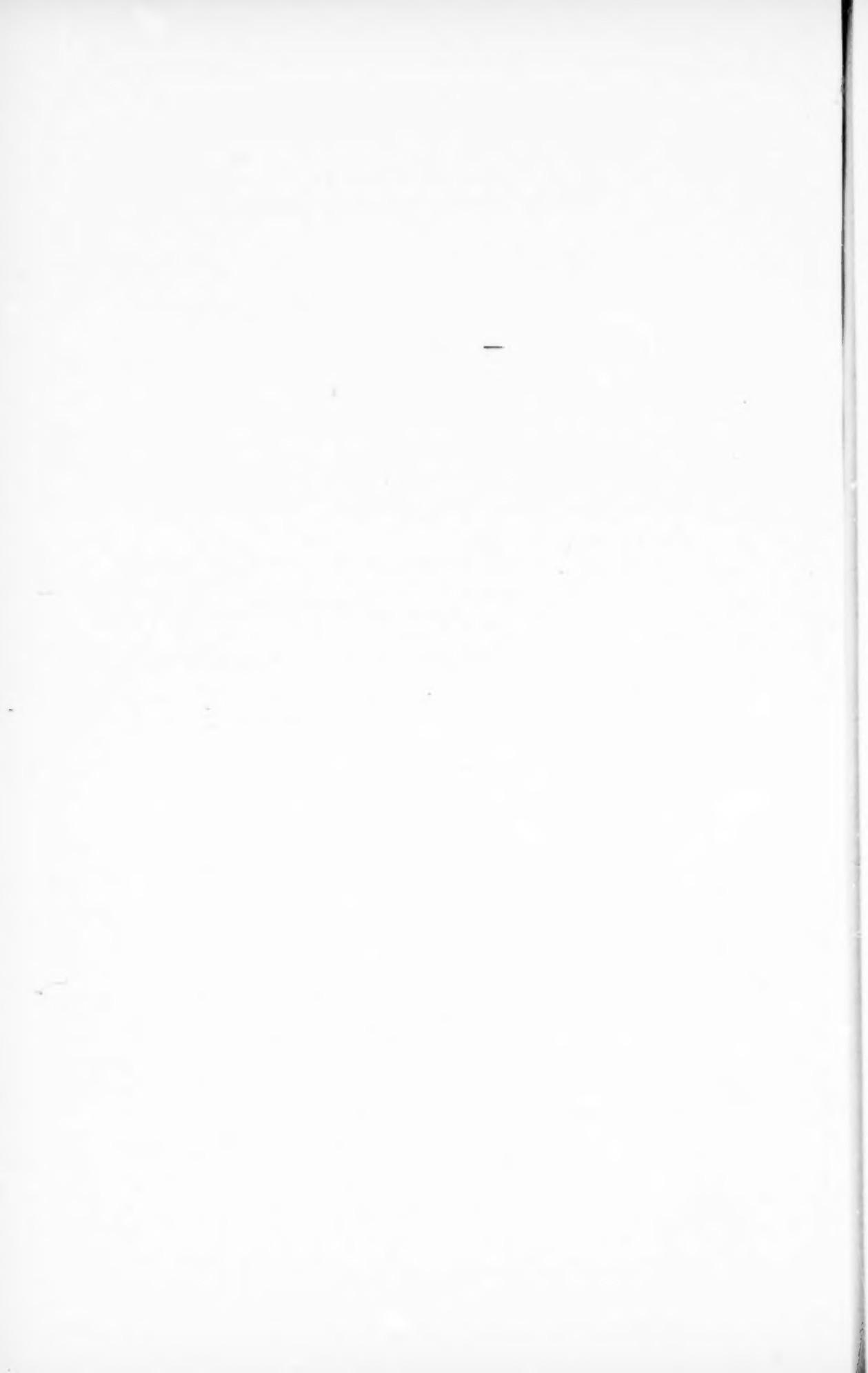


tional right to decide whether to terminate her pregnancy. This position underrates the strength and significance of the doctrine of stare decisis, particularly as applied to this Court's decision in Roe v. Wade.

A. Reaffirmance of Roe v. Wade
Will Promote Stability,
Judicial Efficiency and
Public Faith in the
Judicial System.

This Court has explained the purpose and importance of the doctrine of stare decisis by saying:

"Very weighty considerations underlie the principle that Courts should not lightly overrule past decisions."



Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

Moragne v. States Marine Lines,
398 U.S. 375, 403 (1970).